A

ROSLAN ABDULLAH

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
HASAN LAH JCA
JEFFREY TAN JCA
[CRIMINAL APPEAL NO: C-05-144-2006]

C

1 SEPTEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in a dangerous drug - Trial judge invoking presumption of trafficking upon a presumption of possession - Whether proper*

D

CRIMINAL PROCEDURE: *Appeal - Evidence - Trial judge's evaluation of evidence totally flawed - Trial judge's findings in respect of defence completely unfounded - Whether appellate interference warranted*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Whether prosecution's evidence ought to be evaluated at the end of the prosecution's case - Whether judge ought to undertake a maximum evaluation of prosecution's evidence - Whether evaluation of prosecution's evidence at the close of the entire case a serious misdirection - Whether Criminal Procedure Code, s. 180*

E

F

EVIDENCE: *Presumption - Drug trafficking - Whether presumption of trafficking may be invoked upon a presumption of possession*

EVIDENCE*: Prima facie case - Failure to evaluate prosecution's evidence at the close of the prosecution's case - Whether possible to establish prima facie case*

G

EVIDENCE: *Information leading to fact discovered - Admissibility of statement - Uncertainty over words spoken by accused - Information recorded several hours after it had been given - Confessional content in statement extremely prejudicial - Whether statement ought to be admitted - Evidence Act 1950, s. 27*

H

The appellant was convicted in the High Court for trafficking in dangerous drugs and sentenced to death under s. 39B(2) of the Dangerous Drugs Act 1952. He appealed to the Court of Appeal. A review of the record revealed that the trial judge had found a *prima facie* made out without any evaluation of the prosecution

I

evidence. The trial judge had suspended the question of the veracity and accuracy of the witnesses until after the close of the case for the defence. At the close of the entire case, the judge undertook a cursory evaluation of the entire evidence before convicting the appellant.

Held (allowing the appeal)
Per Jeffrey Tan JCA delivering the judgment of the court:

(1) Under s. 180 of the CPC, the trial judge has to undertake a maximum evaluation of the prosecution evidence at the close of the prosecution's case. *Looi Kow Chai & Anor v. PP* (foll); *PP v. Mohd Radzi Abu Bakar* (foll); *Balachandran v. PP* (foll). (paras 15 & 16)

(2) Since *Khoo Hi Chiang v. PP*, it has been the law that a trial court must evaluate the prosecution evidence at the end of the prosecution's case. The suspension of the evaluation of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence in the instant case was a serious misdirection. With the suspension of the evaluation of the veracity and accuracy of recollection of witnesses until after the close of the case, there could not consequently have been a *prima facie* when the appellant was called to enter his defence. *Balachandran v. PP* (refd). (para 17)

(3) The evaluation of the total evidence was flawed. There was hardly any evaluation of the prosecution's evidence. The findings in relation to the defence were totally unfounded. No reasons were given for the findings that the defence could not be believed and that the demeanour of the appellant and his witnesses was akin to that of actors in court. Where reasons were given, they were not legitimate. (para 20)

(4) The trial judge had invoked both presumptions of possession and trafficking. This was a clear error in law. There could not be a presumption upon a presumption. *Muhammed Hassan v. PP* (foll); *PP v. Tan Tatt Eek and Other Appeals* (foll), *Haryadi Dadeh v. PP* (foll); *PP v. Abdul Manaf Muhamad Hassan* (foll). (para 21)

(5) The trial judge's ruling to admit the information evidence (exh P22) under s. 27 of the Evidence Act 1950 could not also be upheld. This information evidence could not have passed the stringent conditions for admission. There was uncertainty as to the actual words spoken by the appellant -

there were at least two different accounts of the alleged information; the alleged information was recorded hours after it had been given; and the confessional content in the information was eminently prejudicial. The evidence could have been rejected on the ground that it was not a contemporaneous record of the alleged statements of the Appellant. Without this evidence - exh P22 - the prosecution had simply no case. The appellant had been arrested miles way from the house where the drugs were later found in a doorless bedroom which the appellant had no exclusive possession of. A *prima facie* case had not been established. (paras 30 & 31)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah didapati bersalah di Mahkamah Tinggi di atas kesalahan mengedar dadah berbahaya dan dihukum mati di bawah s. 39B(2) Akta Dadah Berbahaya 1952. Perayu merayu kepada Mahkamah Rayuan. Pengkajian semula rekod menunjukkan bahawa hakim bicara telah memutuskan bahawa wujudnya kes *prima facie* tanpa penilaian keterangan pihak pendakwaan. Hakim bicara telah menggantung persoalan kesahan dan ketepatan saksi-saksi sehingga selepas penutup kes pembelaan. Selepas penutupan kes keseluruhan, hakim menjalankan penilaian sepintas lalu keseluruhan keterangan sebelum mensabitkan perayu.

Diputuskan (membenarkan rayuan)
Oleh Jeffrey Tan HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 180 Kanun Tatacara Jenayah, hakim bicara bertanggungjawab menjalankan penilaian maksimum keterangan pendakwaan pada peringkat penutupan kes pendakwaan. *Looi Kow Chai & Anor v. PP (diikuti); PP v. Mohd Radzi Abu Bakar (diikuti); Balachandran v. PP (diikuti)*

(2) Sejak kes *Khoo Hi Chiang v. PP*, ia adalah undang-undang bahawa mahkamah bicara harus menilai keterangan pihak pendakwaan pada perinkat penutupan kes pendakwaan. Penggantungan penilaian kesahan dan ketepatan saksi-saksi sehingga selepas penutupan kes pembelaan seperti di dalam kes ini adalah satu salah arahan serius. Dengan penggantungan penilaian kesahan dan ketepatan saksi-saksi sehingga selepas penutupan kes, tidak wujudnya kes *prima facie* semasa perayu dipanggil untuk membela diri. *Balachandran v. PP (dirujuk)*

(3) Penilaian keseluruhan keterangan adalah cacat. Tiada penilaian dilakukan mengenai keterangan pendakwaan. Penemuan berhubung pembelaan adalah tidak berasas. Tiada sebab diberi bagi penemuan bahawa pembelaan tidak boleh dipercayai dan kelakuan perayu dan saksi-saksi disamakan dengan pelakon-pelakon di mahkamah. Apabila sebab diberi, ia tidak munasabah.

(4) Mahkamah bicara telah menggunapakai kedua-dua anggapan milikan dan mengedar. Ini adalah kesilapan undang-undang yang nyata. Tidak sepatutnya wujud satu anggapan pada anggapan. *Muhammed Hassan v. PP* (diikuti); *PP v. Tan Tatt Eek And Other Appeals* (diikuti); *Haryadi Dadeh v. PP* (diikuti); *PP v. Abdul Manaf Muhamad Hassan* (diikuti).

(5) Keputusan hakim bicara untuk menerima keterangan maklumat (exh. P22) di bawah s. 27 Akta Keterangan 1950 tidak boleh disahkan. Keterangan maklumat ini tidak mungkin lulus syarat-syarat yang ketat untuk diterima. Timbulnya ketidakpastian mengenai apa yang diperkatakan oleh perayu - terdapat dua versi mengenai maklumat yang telah diberi; maklumat telah direkod berjam-jam selepas ia diberi; dan kandungan pengakuan di dalam maklumat adalah menjejaskan. Keterangan boleh ditolak atas sebab ia bukan rekod semasa pernyataan perayu. Tanpa keterangan - exh. P22 - pihak pendakwa tidak mempunyai kes. Perayu telah ditahan polis jauh dari rumahnya di mana dadah-dadah dijumpai di dalam bilik yang tidak mempunyai pintu dan perayu tidak mempunyai milikan eksklusif bilik tersebut. Tiada kes *prima facie* yang dibuktikan.

Case(s) referred to:

Amathevelli R Ramasamy v. PP [2008] 4 CLJ 413 CA ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Chandrasekaran & Ors v. PP [1970] 1 LNS 11 ***(refd)***
Dato Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Francis Antonysamy v. PP [2005] 2 CLJ 481 FC ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Hamiron Mat Udin & 2 Ors v. PP [1947] 1 LNS 32 HC ***(refd)***
Haryadi Dadeh v. PP [2000] 3 CLJ 553 FC ***(foll)***
Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA ***(refd)***
Haw Tua Tau v. PP & Other Cases [1981] CLJ 123; [1981] CLJ (Rep) 11 PC ***(refd)***
Junaidi v. PP [1993] 4 CLJ 201 SC ***(refd)***

A *Kevin John Barlow v. PP & Another Case [1987] 2 CLJ 286; [1987] CLJ (Rep) 139 SC* ***(refd)***
Khoo Hi Chiang v. PP & Another Case [1994] 2 CLJ 151 SC ***(refd)***
Krishna Rao Gurumurthi v. PP & Anor Appeal [2009] 2 CLJ 603 FC ***(refd)***
Krishnan Ramar v. PP [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC ***(refd)***
B *Lam Chi Ming & Ors v. R [1991] 3 All ER 172*
Lee Pin Seng v. PP [1985] 2 CLJ 454; [1985] CLJ (Rep) 185 FC
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(foll)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
C *Pang Chee Meng v. PP [1992] 2 SCR 1* ***(refd)***
PP lwn. Roslan Abdullah [2007] 7 CLJ 249 HC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(foll)***
PP v. Hanif Basree Abdul Rahman [2008] 4 CLJ 1 FC ***(refd)***
PP v. Karim Othman [1994] 2 CLJ 826 HC ***(refd)***
D *PP v. Tan Tatt Eek and Other Appeals [2005] 1 CLJ 713 CA* ***(foll)***
Rangunathan v. PP [1982] CLJ 25; [1982] CLJ (Rep) 63 FC ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 FC ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC ***(refd)***

E **Legislation referred to:**
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, s. 39B(2)
Evidence Act 1950, ss. 24, 27

Other sourse(s) referred to:
F Augustine Paul, *Evidence, Practice & Procedure*, 2nd edn, p 258

For the appellant - Richard Bong; M/s Richard Bong & Co
For the respondent - Tetralina Ahmad Fauzi, AG's Chambers

Reported by Andrew Christopher Simon

G

JUDGMENT

Jeffrey Tan JCA:

H

[1] The charge against the appellant was that he, on 19 May 2001 at 1.20am at house No. Lot 2132, Jambu Rias, 28600 Karak, in the District of Bentong, in the State of Pahang, committed the act of trafficking in a dangerous drug, namely 416 I grams of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 with death.

[2] At the close of the prosecution case, the learned trial judge held that a *prima facie* case had been made out. The accused was ordered to enter upon his defence. At the end of the entire case, the learned trial judge held that there was no doubt as to guilt. Against that decision, the accused appealed.

[3] To be more precise, the learned trial judge found that a *prima facie* case had been made out without any evaluation of the prosecution evidence. Unbelievable but true, at the close of the prosecution case, the learned trial judge merely condensed the prosecution evidence into a single paragraph (for the full text of the judgment of the learned trial judge, see *PP lwn. Roslan Abdullah* [2007] 7 CLJ 249 HC) and then held, without so much as a word on the veracity and accuracy of the prosecution evidence, that a *prima facie* case had been made out.

> Dari keterangan saksi-saksi ini kesemuanya, fakta terhadap kes ini dapatlah digambarkan seperti mana yang telah disampaikan oleh pihak timbalan pendakwa raya semasa beliau menyampaikan ucapan pembukaan kes. Pada 19 Mei 2001 jam lebih kurang 12.20 pagi, OKT telah ditangkap oleh pihak polis berkaitan dengan kesalahan dadah. Pada jam 1.20 pagi hari yang sama, OKT setelah disoal siasat, telah memberikan suatu maklumat kepada C/Insp Jong Lak Kho. Berikutan dengan maklumat itu, C/Insp Jong dan beberapa anggota lain bersama OKT telah pergi ke alamat Lot 2132 Jambu Rias, Karak. Di alamat itu, C/Insp Jong dan juga OKT telah memasuki ke suatu premis yang kemudiannya dibuktikan sebagai rumah OKT. Di dalam sebuah bilik tidur rumah itu, telah dijumpai sebuah beg jenama 'Panther'. Di dalam beg itu dijumpai dua bungkusan plastik jernih yang berisi bahan yang disyaki dadah. Juga dijumpai satu kertas plastik jernih, sebilah gunting, sebilah pisau lipat dan satu kad pergigian atas nama OKT di dalam beg itu. Bahan yang disyaki ganja itu telah diserahkan oleh C/Insp Jong kepada pegawai penyiasat kes, C/Insp Kang Liong Soo. Bahan itu telah dihantar untuk dianalisa oleh ahli kimia yang mana kemudiannya disahkan sebagai cannabis seberat 406.60g.
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> Di akhir kes pendakwaan ... suatu kes yang *prima facie* telah berjaya dibuktikan oleh pihak Pendakwaan. Selaras dengan peruntukan s. 180(3) Kanun Acara Jenayah, tertuduh telah dipanggil untuk membela diri.

[4] Apparently, the learned trial judge had suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence. Only at the end

of the entire case, did the learned trial judge evaluate the entire evidence, by putting side by side the evidence of the prosecution and defence and by asking the following question.

> Persoalannya sekarang, siapakah yang sebenarnya telah bercakap benar di dalam keterangannya. Adakah SP2, SP4, SP7 dan tidak SD1 bercakap benar. Adakah SP2, SP4, dan SP7 juga dan tidak SD2 dan SD3 bercakap benar. Ini sebenarnya adalah menjadi tanggungjawab mahkamah untuk menilai akan setiap keterangan yang dikemukakan sebelum mencapai suatu keputusan yang jitu. Terhadap tugasan mahkamah ini, elok diteliti akan apakah prinsip yang telah diputuskan di dalam kes *Pavone v. Public Prosecutor* [1984] 1 MLJ 77:
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> > Care must be taken to leave suspended the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence.

[5] In *Pavone*, Edgar Joseph Jr J (as he then was) suspended the question of the veracity and accuracy of witnesses in the face of the judgment of Lord Diplock delivering the advice of the judicial committee of the Privy Council in the Singapore case of *Haw Tua Tau v. PP & Other Cases* [1981] CLJ 123; [1981] CLJ (Rep) 11 PC.

[6] The advice of the Privy Council in *Haw Tua Tau*, subsequently approved and applied in the Federal Court decisions of *Rangunathan v. PP* [1982] CLJ 25; [1982] CLJ (Rep) 63 FC, *Dato Mokhtar bin Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC, *Lee Pin Seng v. PP* [1985] 2 CLJ 454; [1985] CLJ (Rep) 185 FC, *Kevin John Barlow v. PP & Another Case* [1987] 2 CLJ 286; [1987] CLJ (Rep) 139 SC, *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC, and *Junaidi v. PP* [1993] 4 CLJ 201 SC, was that the trial judge shall call upon the accused to enter upon his defence if there were some evidence (not inherently incredible) establishing each essential ingredient of the alleged offence,

> At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding "that no case against the accused has been made out which if unrebutted

> would warrant his conviction", within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defence has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance.

[7] That was how it was up and until the end of 1993. Only a minimal evaluation of the prosecution evidence was called for at the end of the prosecution case. If there were some evidence (not inherently incredible) to support each essential ingredient of the alleged offence, the trial court shall call the accused to enter upon his defence.

[8] But that all changed dramatically at the end of 1993, with the advent of *Khoo Hi Chiang v. PP & Another Case* [1994] 2 CLJ 151 SC, where the Federal Court not only declined to follow *Haw Tua Tau* but held that the trial court must subject the prosecution evidence to a maximum evaluation at the end of the prosecution case,

> Consequently, the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible - the *Haw Tua Tau* test - but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt.
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> With considerable regret, therefore, we must decline to follow *Haw Tua Tau* and its progeny *Ragunathan*, *Munusamy* and *Junaidi*, as to the effect of the relevant statutory provisions of the Code to which we have referred and discussed.

[9] In *Tan Boon Kean v. PP* [1995] 4 CLJ 456 FC, another panel of the Federal Court would hold that the 'case' required to be established by the prosecution under s. 180 of the Criminal Procedure Code was a '*prima facie*' case and not a 'beyond reasonable doubt' case.

> We are, therefore, of the opinion that the court below is only bound by the ratio of *Khoo Hi Chiang* that at the close of the case for the prosecution, the duty of the court is to carry out a

A maximum evaluation of the evidence which, according to *PP v. Chin Yoke* [1940] MLJ 47 and followed in *Munusamy v. PP* [1987] 1 MLJ 492 at pp 497-498, necessarily means that the court must consider the whole evidence of the prosecution as tested in the cross-examination, on the essential ingredients of the charge.

B

[10] Nevertheless in *Tan Boon Kean*, the Federal Court was in total agreement that the duty of the court was to carry out a maximum evaluation of the evidence at the close of the prosecution case.

C

[11] That issue, whether it was the duty of the prosecution to establish a *prima facie* case or a beyond reasonable doubt case was settled by a seven-judge panel of the Federal Court (Anuar CJ and Mohd Azmi FCJ dissenting) in *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597 FC, who held that the court before calling D the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt, which therefore would call for a maximum evaluation of the evidence tendered by the prosecution.

E

[12] That should have settled the issue at long last. But that was not to be. On 31 January 1997, s. 180 of the Criminal Procedure Code, was amended to the following, to require the prosecution to only make out a *prima facie* case at the end of its case.

F

180 Procedure after conclusion of case for prosecution

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

G

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall H call upon the accused to enter on his defence.

[13] It would take a further statutory amendment (Criminal Procedure Act 2006, in force since 6th March 2007) to statutorily define "a *prima facie* case" as 'where the prosecution has adduced I credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction."

[14] In *PP v. Hanif Basree bin Abdul Rahman* [2008] 4 CLJ 1, Zaki Azmi PCA, he then was, imparted the following commentary on the development of the law, from *Haw Tua Tau* to the present position:

> Prior to this amendment, as a result of the decision in *Haw Tua Tau v. Public Prosecutor* [1981] 2 MLJ 49, there had been heated discussions on the term *prima facie* in relation to burden of proof at the close of the prosecution case. After the amendment, the discussions on this subject continued culminating in *Balachandran v. Public Prosecutor* [2005] 2 MLJ 301 and *Public Prosecutor v. Mohd Radzi Abu Bakar* [2005] 6 MLJ 393, both Federal Court judgments. Since then, Parliament has introduced the definition of *prima facie*. That term is now defined as 'where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[15] That uncertainty, if any, until settled by the Criminal Procedure Act 2006, was only in relation to the "*prima facie* case". In relation to the evaluation of the prosecution evidence, it has long been settled that the evaluation could not be suspended until after the close of the entire case. That has been the law since *Khoo Hi Chiang*, where it was held that "the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determining whether or not the prosecution evidence is inherently incredible - the *Haw Tua Tau* test - but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the charge against the accused beyond all reasonable doubt". In *Tan Boon Kean*, it was held "that at the close of the case for the prosecution, the duty of the court is to carry out a maximum evaluation of the evidence ... ". And in *Arulpragasan a/l Sandaraju*, it was held that the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt, which would therefore call for a maximum evaluation of the evidence tendered by the prosecution.

[16] Yet, the duty of a trial court at the end of the prosecution case remained the same, despite the 1997 amendment to s. 180 of the CPC. In *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA, Gopal Sri Ram JCA (as he then was) held that the one exercise that a judge sitting alone under s. 180 of the CPC has

to undertake at the close of the prosecution case is to subject the prosecution evidence to maximum evaluation. In *Balachandran v. PP*, Augustine Paul JCA (as he then was) held that the duty of a trial court at the close of the case for the prosecution is to "undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established". Later, in *PP v. Mohd Radzi bin Abu Bakar* (cited to but was not paid heed to by the learned trial judge), the Federal Court reverted to the phrase 'maximum evaluation of the prosecution evidence' to describe the test to be applied, and then provided the following guide to trial courts.

> For the guidance of the courts below, we summarise as follows the steps that should be taken by a trial court at the close of the prosecution's case:
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> (i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinise the credibility of each of the prosecution's witnesses. Take into account all reasonable inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;
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> (ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is 'Yes', then a *prima facie* case has been made out and the defence should be called. If the answer is 'No' then, a *prima facie* case has not been made out and the accused should be acquitted;
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> (iii) after defence is called, the accused elects to remain silent, then convict;
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> (iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. Public Prosecutor* [1963] MLJ 263.

[17] Since *Khoo Hi Chiang*, it has been the law that a trial court must evaluate the prosecution evidence at the end of the prosecution case. There could be no question about it; the suspension of the question of the veracity and accuracy of recollection of witnesses until after the close of the case for the defence in the instant case was a serious, serious misdirection of the first order, for with suspension of the question of the veracity and accuracy of recollection of witnesses until after the close of

the case, there could not consequently have been the *prima facie* case as enunciated in *Balachandran* when the appellant was called to enter upon his defence.

[18] Not just that, we also found that the eventual evaluation of the total evidence was totally flawed. For a start, there was no independent evaluation of the prosecution evidence. In fact, there was no evaluation of the prosecution evidence to speak of. If there were any, then it was purely incidental. The analysis of the evidence by the learned trial judge, now reproduced below *in extenso* to show out the manner in which it was done, commenced at p. 31 and ended at p. 37 of the judgment.

> Meneliti kepada asas pembelaan dari OKT, ia lebih menjurus kepada penafian semata. Beliau menafikan banyak perkara di dalam keterangannya. Beliau menafikan ada memberikan maklumat tentang dadah yang disimpan di rumahnya dalam beg ekshibit P12. Beliau nafikan ada menunjukkan dan mengeluarkan beg tersebut kepada pihak polis, beliau menafikan mengetahui akan isi kandungan yang terdapat di dalam beg tersebut. Beliau menafikan ada menyimpan dadah di dalam beg tersebut serta beliau menafikan ada menyimpan kad gigi di dalam beg tersebut. Terhadap ekshibit P22, beliau menafikan ada memberikan maklumat kepada C/Insp Jong, menafikan ada menandatangani di dokumen ekshibit P22 itu pada hari kejadian serta menafikan akan isi kandungan ekshibit P22 itu.
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> Meneliti kepada keterangan yang telah disampaikan oleh OKT dan dua orang saksinya yang lain itu, adalah sesuatu yang agak sukar untuk Mahkamah mempercayainya dari segi kemunasabahannya. Di sinilah dikatakan 'demeanour' saksi-saksi memainkan peranan. Kebolehpercayaan keterangan saksi-saksi pembelaan ini melalui keterangan masing-masing amat meragukan. Dari segi kemunasabahannya pula, jelas, adalah terlalu jauh untuk menghubungkan kebenaran keterangan yang telah disampaikan itu apabila dibandingkan dengan keterangan-keterangan yang telah disampaikan oleh saksi-saksi pendakwaan yang lain, khususnya keterangan dari SP2, SP4 dan SP7. Kemunasabahan keterangan oleh ketiga-tiga saksi pendakwa ini serta lain-lain keterangan saksi selebihnya itu tidak tercabar oleh keterangan dari saksi-saksi pembelaan ini. Seperti yang diputuskan di dalam kes *Public Prosecutor v. Karim Othman* [1994] 2 CLJ 826, penggantungan kepada bentuk pembelaan yang berupa 'bare denial' semata, tidak mencukupi untuk mengakas di atas prinsip imbangan kebarangkalian akan andaian/anggapan memiliki dan dalam kawalan dadah berbahaya serta pengedarannya.

Di pihak pendakwaan, penggantungan yang dilakukan berdasarkan kepada s. 27 Akta Keterangan 1950 adalah merupakan sesuatu yang tepat. Adalah berpandukan kepada maklumat yang diberikan oleh OKT yang mana seterusnya telah membawa pasukan polis ke rumahnya dengan menunjukkan arah ke rumahnya serta menunjukkan akan bilik tidurnya, telah membawa kepada penjumpaan dadah tersebut seperti yang tersimpan di dalam ekshibit P12. Seperti keterangan oleh isteri OKT sendiri bahawa beg P12 itu digunakan oleh OKT untuk dibawa bekerja. Maknanya beg tersebut adalah milik sebenar OKT serta tersimpan di dalam bilik tidurnya sendiri. Walaupun keterangan cuba diberikan yang bilik tidurnya boleh dimasuki oleh kawan-kawannya serta saudara maranya, namun keterangan beliau ini tidak kukuh tanpa keterangan sokongan yang lain bagi mengiakan sedemikian. Malah, adalah sesuatu yang agak janggal di dalam kehidupan orang-orang timur bagi amalan begitu dijadikan suatu kelaziman. Bilik tidur adalah suatu tempat diibarat 'kehormatan' yang perlu dijaga bagi sesuatu keluarga. Sukar untuk diterima hakikat bahawa ia adalah sesuatu yang biasa untuk sesiapa sahaja keluar masuk ke bilik tidur, apatah lagi dalam kehidupan di kampung. Dari segi jarak masa beliau tinggalkan rumah pula, menurut keterangannya, kali akhir beliau meninggalkan rumah untuk pergi ke Kuala Lumpur adalah pada pagi 18 Mei 2001; iaitu cuma satu hari sebelum tarikh kejadian; tersebut. Jadi, di dalam tempoh satu hari itu, sukar untuk diandaikan akan elemen-elemen yang 'alien' terjadi di rumahnya itu, khususnya di bilik tidurnya itu. Juga, tiada keterangan untuk menunjukkan ujud sedemikian. Peguam menghujahkan akan OKT tiada pengetahuan langsung akan isi kandungan yang terdapat di dalam beg ekshibit P12, lantas menafikan akan kewujudan dadah tersebut. Di dalam soal ini, apakah yang dikatakan dengan 'possession' itu. Taylor J di dalam kes *Leow Nghee Lim v. Reg* [1956] MLJ 28 menyatakan (ms 30):

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it. The word possession therefore implies full or exact knowledge.

Jelaslah tanpa pengetahuan, tidak akan ujud pemilikan. Di dalam kes ini, dari keterangan-keterangan yang diperturunkan di atas tadi, jelaslah elemen pengetahuan oleh OKT terhadap kewujudan dadah di dalam beg ekshibit P12 yang terdapat di dalam bilik tidurnya di rumah di Jambu Rias itu tidak dapat diketepikan akan kewujudannya. Maklumat yang diberikan dan terkandung di dalam ekshibit P22 yang membawa kepada penemuan fakta dadah itu adalah berselari dengan hakikat ini.

Berbalik kepada s. 27 yang dibangkitkan itu. Mahkamah Agong di dalam kes *Wai Chan Leong v. Public Prosecutor* [1989] 3 MLJ 356 dengan memetik keputusan Hakim Suffian di dalam kes *Chong Soon Koy v. Public Prosecutor* [1977] 1 LNS 20, menyatakan: 'it is fallacious to treat 'fact discovered' within s. 27 as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact.

Mahkamah di dalam kes *Wai Chan Leong v. Public Prosecutor* juga menyatakan: 'It must also be observed that the legislature had used the expression "information' in s 27 of the Evidence Act 1950 and therefore did not intend it to have the same meaning as a statement ...'. Seperti yang dihujahkan oleh timbalan pendakwa raya bahawa s. 27 adalah tidak sama pemakaiannya jika dibandingkan dengan s. 37 Akta yang sama.

Definasi 'fact' di bawah s. 37 Akta dinyatakan sedemikian:

'fact' means and includes -

(a) anything, state of things or relations of things capable of being perceived by the senses,

(b) any mental condition of which any person is conscious.

Lantas hujahan oleh timbalan pendakwa raya akan skop pemakaian s 27 khususnya di dalam kes ini adalah menepati definisi seperti yang dihuraikan tadi. Yang penting ialah maklumat yang diberikan dan bukannya pengakuan. Maklumat itu menjurus kepada penemuan kepada fakta seperti yang terjadi di dalam kes ini.

Di akhirnya, setelah saya meneliti akan keterangan-keterangan yang telah diberikan di hadapan mahkamah ini, saya memutuskan yang OKT Roslan @ Rosli bin Abdullah adalah bersalah dan disabitkan di atas pertuduhan sepertimana yang dibacakan di awal tadi.

[19] In the above 1st paragraph beginning with the word "Meneliti", it was held that the defence was a denial. In the above 2nd paragraph also beginning with the word "Meneliti", it was held that the testimony of the appellant and his witnesses could not be believed, that the demeanour of the appellant and his witnesses was akin to that of actors in court, and that the testimony of the appellant and his witnesses were too far off the truth as when compared to the testimony of the prosecution witnesses (in particular SP2, SP4 and SP7) which was not challenged by the testimony of the appellant and his witnesses. It

was further held that the denial of the appellant was not sufficient to rebut the presumption of possession and trafficking. In relation to that latter finding, the trial court had relied on *PP v. Karim Othman* [1994] 2 CLJ 826 HC, where it was held that the accused had "failed to rebut on a balance of probabilities the presumption of control and possession of the incriminating exhibits, and therefore of trafficking in the same". In the above 3rd paragraph beginning with the word "Di pihak", it was held that the prosecution could rely on s. 27 of the Evidence Act 1950, that P12 (the bag containing the drugs) was discovered as a consequence of the information given by the appellant who had guided the police party to his house and bedroom, that it was the testimony of the wife of the appellant that P12 had been used by the appellant, and that P12 consequently belonged to the appellant. In relation to the evidence of the defence that the bedroom was accessible to others, it was held that it was difficult to accept that story as it was not the practice of people in the East, especially people in traditional villages, to invade the privacy of a bedroom, and that it was difficult to accept that the bedroom could have been invaded during the one day that the appellant was away, and that there was no evidence that showed the truth of that defence. In relation to the submission by the defence that the appellant had no knowledge of the contents of P12, it was held that based on the evidence the appellant had knowledge. "Maklumat yang di berikan dan terkandung di dalam exh. P22 yang membawa kepada penemuan fakta dadah itu adalah berselari dengan hakikat ini." In the next four paragraphs, the learned trial judge cited some legal authorities and then made his ruling on the purport and effect of s. 27 of the Evidence Act 1950.

[20] As said, there was no evaluation of the prosecution evidence. And the findings in relation to the defence were totally *ipse dixit*. No reasons were given for the findings that the defence could not be believed and that the demeanour of the appellant and his witnesses was akin to that of actors in court. Where reasons were given, they were not legitimate. How could it have been said as a statement of fact that people in the East would invariably respect the sanctity of another's bedroom? If that were so, then there would not be that many incest, and housebreaking crimes.

[21] The finding that the denial of the appellant was not sufficient to rebut the presumption of possession and trafficking was a complete *faux pas*. It would not have been that out of order, had

it been merely said that the denial of the appellant was not much of a defence or that the denial of the appellant had not cast any doubt. But it was totally indefensible to invoke the presumptions of possession and trafficking at the same time. The rule, as laid down by the Federal Court in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC and followed by the Federal Court in *PP v. Tan Tatt Eek and Other Appeals* [2005] 1 CLJ 713 CA, *Haryadi Dadeh v. PP* [2000] 3 CLJ 553 FC and in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 FC, is that there cannot be a presumption upon a presumption. Yet, we found, that apparent from the finding "Seperti yang diputuskan di dalam kes *Public Prosecutor v. Karim Othman* [1994] 2 CLJ 826 HC, penggantungan kepada bentuk pembelaan yang berupa 'bare denial' semata, tidak mencukupi untuk mengakas di atas prinsip imbangan kebarangkalian akan andaian/anggapan memiliki dan dalam kawalan dadah berbahaya serta pengedarannya", that the learned trial judge had invoked both presumptions of possession and trafficking. That was a clear error in law.

[22] Also, the ruling to admit the information evidence - "suspek telah mendedahkan bahawa beliau ada menyimpan dadah ganja di rumahnya di alamat no. Lot 2132, Jambu Rias, 28600, Karak" - under s. 27 of the Evidence Act 1950 (see 58AR) could not be upheld.

[23] Section 27 of the Evidence Act 1950 provides, "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved". "Section 27 is a concession to the prosecution ... since the discovery itself provides the acid test, the truth of the statement that led to the discovery is thereby guaranteed. Admissibility of evidence under s. 27 is in no way related to the making of the confession; rather, such evidence is admitted on clear grounds of relevancy as directly connecting the accused with the object recovered" (*Chandrasekaran & Ors v. PP* [1970] 1 LNS 11, per Raja Azlan Shah J, as HRH then was). " .. s. 27 is an exception to the prohibition imposed by the preceding ss. 24, 25, and 26 ..." (*Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 SC).

[24] That s. 27 is independent of s. 24 was reaffirmed in *Goi Ching Ang v. PP* [1999] 1 CLJ 829 FC, where Chong Siew Fai CJ (Sabah & Sarawak) said as follows:

> Section 27 is silent as to or bears no ligature to the voluntary nature or otherwise of the information. The words 'whether the information amounts to a confession or not' in section 27 relates merely to the character of the information, ie, whether it is a confession, or a statement falling short of a confession. In other words, unlike s. 27 when compared with ss 25 or 26 of the Evidence Act 1950, a comparison of s. 27 and s. 24 does not show that they contain any words or phrases bearing or capable of bearing any reference to one another. From the wordings in the two sections, they stand independently of each other.

[25] A caution is not a prerequisite. In *Goi Ching Ang*, at 520 - 521, the Federal Court imparted:

> ... once an information is proved to be within the province of s. 27, the trial court would admit it in evidence (see eg *Lee Kok Eng v. PP* [1976] 1 MLJ 125 (FC); *PP v. Sandra Margaret Birch* [1977] 1 MLJ 129; *PP v. Toh Ah Keat* [1977] 2 MLJ 87 (caution not administered under s. 113 of the Criminal Procedure Code); *Sum Kum Seng v. PP* [1981] 1 MLJ 244 (FC); *Wai Chan Leong v. PP* [1989] 3 MLJ 356 (SC) (drug trafficking case – no caution administered under s. 37A(b) of Dangerous Drugs Act); *Choo Yoke Choy v. PP* [1992] 2 MLJ 632 (SC) notwithstanding that the said information might not have been given voluntarily. (See eg *PP v. Er Ah Kiat* [1966] 1 MLJ 9, *Chandrasekaran & Ors v. PP* [1971] 1 MLJ 153; *Chong Soon Koy v. PP* [1977] 2 MLJ 78 (FC)).

[26] "There is no duty on the prosecution to establish the voluntariness of the information" (*Amathevelli R Ramasamy v. PP* [2008] 4 CLJ 413 CA, per Raus Sharif JCA). But that is not to say that information could be extracted from an accused. Information must be properly and fairly obtained, and not compelled from an accused (*Lam Chi Ming & Ors v. R* [1991] 3 All ER 172). Indeed, in *Goi Ching Ang*, the Federal Court opined that voluntariness is desirable (see 524), that the court should ensure that the standards of propriety in obtaining s. 27 information are scrupulously followed, and that the court has a discretion to exclude "evidence obtained in an oppressive manner by force or against the wishes of an accused person or by trick or by conduct of which the police ought not to take advantage" (see 527). The same was also held by the Federal Court in *Francis*

Antonysamy v. PP [2005] 2 CLJ 481 FC. Recently, in *Krishna Rao Gurumurthi v. PP & Anor Appeal* [2009] 2 CLJ 603 FC, the Federal Court per Richard Malanjum CJ (Sabah and Sarawak) held that the admission of information evidence does not demand voluntariness or the absence of any form of oppression, inducement, threat or promise to the maker, but that the court has the discretion to exclude it on the ground that its prejudicial effect outweighs its probative value.

[27] Yet " ... for s. 27 ... to apply, the information must be such as has caused the discovery of a fact. In other words the fact must be the consequence and the information the cause of its discovery ... the information must relate distinctly to the fact discovered" (*Wai Chan Leong*). " ... in order for the section to apply there must be evidence of the information upon which the fact was discovered" (*Evidence, Practice & Procedure*, 2nd edn by Augustine Paul, at p. 258). " ... the first step which must be taken before s. 27 can be invoked at all must be proof of some fact discovered as a result of the information given by the accused" (*Hamiron Mat Udin & 2 Ors v. PP* [1947] 1 LNS 32 HC per Murray-Aynsley; see also *Pang Chee Meng v. PP* [1992] 2 SCR 1, where it was held that emphasis is placed on the fact discovered and not on the information, for the fact discovered confirms the truth of the information).

[28] "Section 27 is not intended to let in a confession generally and not one word more of the information which the accused supplied should be given in evidence that is strictly necessary to show how the fact which was discovered is connected with accused so as in itself to be a relevant fact against him" (*Krishnan Ramar v. PP* [1987] 1 CLJ 28; [1987] CLJ (Rep) 145 SC per Wan Sulaiman SCJ). Consequently, courts must guard against the danger of the abuse of s. 27.

[29] In *Hasamuddin Talena v. PP* [2002] 2 CLJ 504 CA, Gopal Sri Ram JCA, as he then was, said as follows:

> Approximations are not permitted. In other words, the exact words spoken by an accused have to be proved. An illustration of that proposition may be found in *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, where Abdul Hamid Omar LP reminded us of the need for vigilance, 'to ensure the credibility of

A evidence by the police personnel in respect of this section, (that is, s 27) which is so vulnerable to abuse. The rationale for the rule adverted to a moment ago appears in the judgment of Syed Agil Barakbah J (as he then was) in *Birch v. PP* [1978] 1 MLJ 72. This is what he said:

B

> Information leading to the discovery must relate distinctly to the object so recovered and nothing more. Only so much of such information is admissible. Where such information is held to be admissible, the action of the accused which directly leads to such discovery, in this case the act of the
C appellant in approaching the green bag and opening it, is of little value and ought to be treated with caution as it is prejudicial to the accused. Further, there was no indication one way or the other what had caused the appellant to lead the police there. Whether her intention was to confess her guilt or to indicate Mohd Desa's guilt still remain uncertain.
D To my mind, since more than one inference has arisen, the inference in favour of the defence ought to be accepted.'

Since nothing more than the information given by an accused is admissible, it follows that the information must be exact and
E recorded in the language or words used by the accused. The strictness of the rule in the application appears sufficiently from the following passage in *Sarkar on Evidence* (14th Ed) at p 492:

> Statements made by accused to police officers which are or may be provable under s. 27 should be clearly and carefully
F recorded. They should be recorded in the first person, that is to say, as far as possible in the actual words of the accused. They should not be paraphrased (*In Re Athappa Goundan* AIR [1937] Mad 618; *Re Ramamurthy* AIR [1941] M 290; *Naresh v. R* 46 CWN 180; *Public Prosecutor v. Pasala* AIR [1945] Mad 2021; *Public Prosecutor v. Venkoba*
G [1937] MWN 73; *Chenna v. King Emperor* AIR [1940] Mad 710; *Gaya v. State* AIR [1957] All 459; *Nathuv State* AIR [1958] All 46). No judge should allow one word more to be deposed to by the police than it is absolutely necessary to show how the fact discovered is connected with the
H accused.

[30] The alleged information evidence could not have passed the stringent conditions for admission. In the first place, there was uncertainty as to the actual words that were spoken by the
I appellant. The alleged information that SP2 (Inspector Jong Lak Kho) recorded hours after it had been given and hours after the raid (see 61AR) was "suspek telah mendedahkan bahawa beliau ada menyimpan dadah ganja di rumahnya di alamat no. Lot 2132,

Jambu Rias, 28600, Karak" (see exh. P22). But the alleged information that SP2 related in court was quite different, for it was the testimony of SP2 that the information from the appellant was "saya ada simpan dekat rumah" (see 45 - 46AR), or "dia ada simpan ganja di rumah, dia setuju untuk bawa ke tempat itu … dia ada beritahu saya rumahnya iaitu di Jambu Rias" (se 46AR), or "saya ada simpan ganja, dekat rumah di Jambu Rias" (see 46AR). The proscribed drugs were found in a bag in one of the bedrooms of Lot 2132 Jambu Rias, Karak. It was not found near Lot 2132 Jambu Rias, Karak. But given that the actual words of the appellant were not unambiguously proved, in that there were at least 2 different accounts of the alleged information, then it could not be said that the fact discovered must be the consequence and the alleged information must be the cause of its discovery. Exhibit P22 should have been rejected on that ground alone. In any event, the confessional content "saya ada simpan ganja" in the alleged information, which was eminently prejudicial, should not have been admitted. Indeed, the entire exh. P22 could have been rejected on the ground that it was not a contemporaneous record of the alleged statements of the appellant. In fact, exh. P22 was not even a record of the alleged statements of the appellant. More than anything else, exh. P22 was SP2's record of the events that had transpired hours before "berdasarkan kepada ingatan saya" (see 67AR). Really, nothing spoke for admission of exh. P22.

[31] Without exh. P22, the prosecution had simply no case. The appellant was arrested probably miles from the said house, while the proscribed drugs were found inside a bag (P12) in a bedroom of the said house. Indisputably, the appellant was not in actual physical custody or control of the proscribed drugs. In those circumstances, so as to prove possession of the proscribed drugs, the prosecution had to prove that the appellant had exclusive possession of the bedroom to begin with. But exclusive possession of that bedroom was not proved, for that bedroom was the bedroom of SP4 and appellant (see 79AR and 85AR). Worse still, the evidence was that the bedroom had no door (see 85AR) and was accessible to neighbours and friends (see 86AR). Admittedly, there was the evidence from SP4 that the Appellant was the owner of the bag (P12). But that evidence from SP4 was obtained, or was it extracted or coerced, from SP4 in the course of the impeachment proceedings taken by the prosecution against her (see 80AR). At the end of the day, all that was proved

against the appellant was that in the bedroom that he shared with SP4 was arguably his bag (P12). But exclusive possession of that bedroom was not proved, and hence it could not be inferred that the appellant had possession of the drugs inside his bag. Perhaps the appellant had knowledge of the drugs, but "mere knowledge ... is not sufficient to establish possession (see *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 SC). A *prima facie* had not been made out. At any rate, the whole thing was a complete mistrial.

[32] It was for those reasons that we had allowed the appeal, set aside the conviction and sentence, and acquitted the appellant when we heard the appeal on 25 May 2009.